

MISSOURI DEPARTMENT OF NATURAL RESOURCES



CLEANUP LEVELS FOR MISSOURI (CALM) Appendix E

Institutional Controls

**Division of Air and Land Protection
Hazardous Waste Program**

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CLEANUP LEVELS FOR MISSOURI (CALM)

APPENDIX E - INSTITUTIONAL CONTROLS

PUB468E





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1. INTRODUCTION

The CALM process is structured so that a restrictive covenant, sometimes referred to as a deed restriction, must be filed in the subject property's chain of title for any cleanup that does not meet the Scenario A cleanup levels. For properties remediated to Scenario A cleanup levels, only a notification, in the form of a copy of the certification of completion letter, must be filed in the subject property's chain of title. The restrictive covenant provides notification that contaminants remain onsite at levels the Department has determined exceed Scenario A (unrestricted use) concentrations. It is a legal document that describes both required and prohibited activities. When engineering controls are employed at a property, the restrictive covenant may establish certain criteria which will normally be both prescriptive, explaining what must be done, and restrictive, explaining what must not be done, with regard to installing and maintaining an engineering control. Similarly, land use restrictions are laid out in terms of required and prohibited activities.

Institutional controls are a key element of the risk-based remediation and closure process. Because future property use may result in cleanup to less stringent standards, institutional controls must be used to ensure that the criteria used to evaluate the property use under CALM do not change substantially. For example, a site cleaned up to an industrial land use (Scenario C) cleanup level may not be considered clean by DNR if the land use changes to residential. Likewise, when engineering controls are used to minimize exposure to contamination remaining on a site, institutional controls must be put into place. In this case, the institutional control is designed to ensure that the engineering control is maintained so that it continues to function as an effective exposure barrier to the contaminants remaining on the site. For these reasons, institutional controls may become an integral part of the overall remediation of a contaminated property.

The department requires that the certification of completion letter be recorded in the property chain of title for all sites. This requirement is meant to ensure that subsequent purchasers of the property are aware that investigation and/or remediation has occurred at the site. The notification may then prompt the prospective purchaser or other interested party to contact the DNR to learn more about the site remediation, most likely through review of DNR's files. This mechanism may assuage concerns the interested party has regarding the environmental condition of the property, or point out the limits of the remediation. This provision benefits the owner of the property by ensuring that anyone conducting a title search is aware that actions have been taken to remediate contamination.

The department uses the restrictive covenant as its primary institutional control, although the title notification will also be frequently used. The restrictive covenant, as explained in greater detail below, is filed in the subject property's chain of title. Recording the document with the



Recorder's Office in the county or city in which the property is located causes the restrictive covenant to become legally binding and therefore enforceable. The restrictive covenant is written so that it is applicable to the current property owner and all subsequent property owners. The restrictive covenant also provides DNR an easement by which the department may conduct routine inspections of the property. The department requires such easements when engineering controls are used so as to verify their integrity. Inspection easements also allow the department to verify that any land use restrictions are being met.

Public participation requirements are also a part of the institutional controls process. The department, through CALM, has set forth the minimum public participation requirements necessary when addressing a site through the CALM process. Like the restrictive covenant, public participation requirements are an integral part of the overall remediation of a site. They allow members of the public who may be affected by the remedial actions proposed for a site to comment and make their concerns known. These requirements are structured so that DNR is made aware of all relevant comments.

The institutional controls and public participation requirements for CALM are summarized in the flow chart in Figure E1.

2. PUBLIC PARTICIPATION

2.1 General Discussion

Public participation needs will vary by site and are not necessarily dependent on the land use scenario or the tier at which a site is evaluated. For example, cleanup and redevelopment of a former manufacturing facility located close to residential neighborhoods using Tier 1 commercial use standards (e.g. Scenario B) may generate significant interest from local residents even though the conservative Tier 1 standards are being used. Conversely, a relatively small groundwater contamination problem in an unused shallow aquifer in the center of a large industrial area that is evaluated under Tier 3 may generate very little interest from the public, local government or surrounding businesses, even though risk-assessment modeling may generate cleanup standards less stringent than the conservative Tier 1 standards. Because of the variety of factors involved in each cleanup site, the public notification and participation requirements should be tailored to each site.

The level of public participation is affected by the complexity of the cleanup, the location of the site in relation to municipalities and population, and the character of the surrounding neighborhood (residential, industrial, etc.). A flexible "menu" approach has been

**Table E1: Institutional Controls and Public Participation Requirements**

Requirements for...	Institutional Controls	Public Participation
Unrestricted Use Cleanups (Scenario A)	•None required	•No requirements ¹
Restricted Use Cleanups (Scenarios B & C)	•Land use restrictions (restrictive covenant) •Monitoring Contract	•Notification of Local Government •Respond to and resolve any comments received •Additional site specific elements as needed (see below)
Site Specific Elements (may be required at some sites)	•Restrictive Covenant for maintenance of Engineering Controls if used	•Submit PP Plan to DNR •Newspaper Advertisement inviting public comment •Respond to and resolve any comments received •Hold Public Availability Session

¹ the department may require public participation activities if deemed necessary

developed which includes activities that increase public participation in proportion to the need based on site conditions.

A requirement for restricted-use (Scenarios B and C) cleanups is written notification of the local government entity as described in 2.2.B(1) below.

2.2 Public Participation Requirements

A. Unrestricted Land Use (Scenario A)

Generally, cleanups to Scenario A standards at any tier will not require any public notification or participation. The Scenario A cleanup values were designed to be protective of human health and the environment with no restrictions whatsoever on land use. Therefore, it is expected that cleanups performed to this level will generate little or no public interest or concern. The department reserves the right to require public participation elements for these cleanups if special circumstances require it.



B. Restricted Use (Scenarios B and C) Basic Public Participation Requirements

- (1). Within 30 days of acceptance of a site into the VCP, the participant must provide written notice of the site's entry into the program to the city or town engineer of the city or town in which the property is located, (if the city or town does not have a city engineer, notice must be provided to the mayor or city manager), with a copy sent to the mayor's office and DNR. For sites in an unincorporated area, notice must be provided to the presiding county commissioner or his or her equivalent. The notice must explain the project, the current and anticipated future land use, and DNR's involvement. The notice must include the VCP participant's name and address, the DNR project manager's name and address, and a request that written comments regarding the project be forwarded to the VCP participant and DNR by a specified date, not less than two weeks from the day the notice was made. If significant comments are received as a result of this process and the remedial action plan (RAP) has not yet been prepared and therefore is not available for review and comment, a comment period for the RAP should be allowed following its submission to the department.
- (2). All substantive comments related to specific provisions in the RAP, the selection of cleanup levels, or the overall risk associated with the cleanup, that are received as a result of the notice provided in accordance with 2.2.B.(1) above, must be considered and addressed by the VCP participant, in consultation with DNR, before remedial actions begin at the site.

C. Site-Specific Elements

The department may require additional public participation actions based on the complexity of the site, the contaminants of concern at the site, the proximity of the site to residential areas, and the number of comments and inquiries DNR receives regarding the project. The following are examples of additional public participation activities that the department may require.

- (1). In cases where extensive public participation activities will be required, a formal public participation plan should be submitted to the department for review and approval. The plan must explain how the public participation requirements are to be met. The plan must be submitted to DNR at least two weeks before placement of the advertisement discussed in 2.3.C.(2). below.



- (2). An advertisement in the public notices or legal notices section of the newspaper of the city or town where the site is located or the city or town nearest the site may be required. The advertisement must be placed within 30 days of submittal of the Remedial Action Plan (RAP) for the site, with a copy of the advertisement submitted to the DNR. The advertisement must state the name and address of the site, the owner's/operator's (dependent upon who is responsible for remediation of the site) name and address, a brief description of the remediation project planned for the site, an explanation of DNR's participation in the project, and a contact name and address for both the VCP participant and DNR. The advertisement must also include a statement requesting written comments, name and address where comments should be sent, and a date by which comments must be submitted. The comment period must extend at least 30 days from the first publication date of the advertisement.
- (3). If DNR determines, based on the number and substantive nature of comments received regarding the proposed project, that an availability session should be held, the VCP participant must arrange for the session. The public availability session should be held within 30 days after the close of the written comment period. The availability session must be held at a location near the property to be remediated and must be advertised in the local newspaper for at least ten days before holding the session. The date, time, and location of the public availability session must be provided in the advertisement. Public availability sessions must begin no earlier than 6:00 p.m. if held on Monday through Friday, or they may begin at any time after 9:00 a.m. if held Saturday, and may not be held on Sundays. The advertisement must provide a telephone number for those wishing to attend the session to call for more information. The availability session must be open to the public and at least one representative of the VCP participant and one member of DNR must be present at the session.
- (4). The VCP participant, in consultation with DNR, must respond to all comments received as a result of the newspaper advertisement, the public availability session, or through other avenues. A copy of all comments received by the participant must be provided to DNR within 30 days of receiving the comments. This includes written and faxed comments and spoken comments received by telephone or in person. The participant, in consultation with DNR, may respond to all comments received with one response letter or respond directly to each individual. If only one letter is



drafted, a copy of the comment letter must be sent to each individual who commented. All substantive comments regarding the RAP or the proposed cleanup levels that are received by the VCP participant will be addressed and, if appropriate, will be considered when finalizing the remedial action plan for the site.

- (5). The department may require additional public participation actions as needed.

D. Dispute Resolution

In the event that an affected party and the VCP participant are unable to resolve a dispute arising during the public participation process, and the dispute cannot be resolved through the involvement of the VCP, the dispute may be taken up with the local governmental bodies concerned and/or brought before the Hazardous Waste Management Commission.

E. Documentation

The department must approve the degree of public participation for each project prior to initiation of the public participation actions. The participant must document in the final CALM report that the public participation requirements for the site have been met. Should the minimum public participation requirements set forth here not be met, the DNR will not issue a certification of completion letter for the site.

3. TITLE NOTIFICATIONS

3.1. Title Notification When a Limited Portion of a Property is Remediated

It is the department's intent and preference that complete property parcels be entered into the VCP so that the investigation, remediation and certification of completion will pertain to the entire property for all contaminants of concern. However, participants are allowed to address contamination on a portion of their property with certain conditions. If the remediation is restricted to a portion or particular area of a property, the certification of completion will specify which area of the property was addressed through the VCP. This area must be surveyed and its legal description included in the certification of completion. The department may require that a copy of the certification of completion be placed in the chain of title as a notification that the investigation and/or remediation was limited to certain areas of the property. The department must be sent a copy of the certification of completion letter as recorded, as documentation that this requirement has been met.



4. RESTRICTIVE COVENANTS

4.1 Restrictive Covenant Required

The VCP requires that a restrictive covenant be placed in the property chain of title any time contaminants are left on a site at concentrations that exceed the cleanup levels determined using the Scenario A land use exposure assumptions, regardless of the Tier under which the cleanup was conducted or whether engineering controls are used.

4.2. Restrictive Covenant Structure and Purpose

The purpose of the restrictive covenant is to ensure that the property use scenario and other conditions that the CALM evaluation was based on do not change to the degree that exposure to contaminants is significantly increased. This applies to all sites remediated to Scenario B or C levels, at any Tier. Note that this is only relevant if the property use changes from unrestricted use (i.e., Scenario A) to a less controlled use (i.e., Scenarios B or C) use. For example, the use of a property evaluated under CALM as a Scenario C property changing to a use befitting a Scenario A property is not allowed. Of course, the use of a Scenario A property for Scenario B or C-type uses poses no additional risk and is not prohibited.

The restrictive covenant also serves to ensure that any engineering controls put into place as an integral part of the remedial action process are installed correctly, maintained as long as necessary (as determined by the DNR), and that their existence is noted in the property chain of title so that future owners of the property are aware of the engineering controls. For instance, if a site is capped to eliminate human exposure to subsurface contamination via the ingestion, inhalation, and dermal pathways, the restrictive covenant will require that the cap be properly installed and maintained so that the cap remains an effective barrier to the contaminated soil below the cap for as long as the contaminated soil contains contaminants at levels determined to be a real or potential hazard to human health via one or more of the three above-mentioned pathways.

The restrictive covenant, when necessary, is an integral part of the overall remediation process. Failure to comply with the restrictive covenant requirements will result in revocation of the certification of completion letter and potential monetary penalties.

4.3. Specific Restrictive Covenant Provisions

The restrictive covenant is structured to serve as follows:



1. Provides notice to future prospective property owners or occupants of the existence of residual contaminants on the property at levels exceeding cleanup levels appropriate only for Scenario A land use;
2. Prescribes actions that must be taken to install and maintain engineering controls; and;
3. Prohibits certain activities and land uses. Activities that may negatively affect the integrity of engineering controls put into place on the property are prohibited, as are activities that may result in human or environmental exposure to the contaminants remaining on the property. The use of the property is restricted to the use specified during evaluation and remediation of the property using CALM, or more restrictive uses (for example, a property cleaned up to Scenario B levels can also be used for Scenario C-type uses without notification or approval of the department). If future additional cleanup at the site reduces contaminant levels below Scenario A cleanup values, the restrictive covenant may be removed through placement of an amendment (drafted by the department) in the property chain of title.

4.4. Easements For Inspection of Engineering Controls and Verification of Land Use

A key element of each restrictive covenant is an easement provision that allows DNR access to the site for the duration of the restrictive covenant for the purpose of periodically inspecting the site to 1) ensure that the land use has not changed such that exposure factors are substantially different, and 2) to evaluate the condition of engineering controls installed on the property as part of the remediation of the site under CALM. The inspections will be limited to CALM cleanup-related issues and specific requirements of the restrictive covenant, and will not be used as an opportunity to inspect the property or operations with respect to other state or federal environmental regulations. Arrangements will be made with the property owner/operator in advance of the inspection. The easement, as part of the restrictive covenant, is legally binding.

4.5. Recording the Restrictive Covenant

The restrictive covenant must be recorded with the Recorder's Office in the county in which the property is located. The restrictive covenant must be signed and recorded by the property owner (or his or her authorized delegate). The owner must submit to DNR a copy of the duly recorded restrictive covenant as documentation of recording. The certification of completion letter will not be issued until DNR has received this documentation.



In some cases, a site map may be attached to the restrictive covenant showing locations where contaminants remain on the property at levels exceeding Scenario A cleanup levels. The department may require a survey of the contaminated portion of the site, produced by a surveyor licensed in the state of Missouri, for this purpose. A survey is particularly important in cases where buildings or other landmarks are to be radically altered or obliterated during redevelopment.

For properties where only a discrete portion of the property has been addressed under CALM and a restrictive covenant is required, DNR will require a survey of that discrete portion of the property. If contamination is widespread across the property, the owner may elect to place the entire property under the restrictive covenant. The department may also require this if it determines that most of the property is contaminated at levels exceeding Scenario A cleanup levels.

If engineering controls, particularly surface or subsurface caps and barriers, are installed at a site as a part of the remediation process, a survey, by a surveyor licensed in the state of Missouri, must be conducted so that the engineering controls are precisely located on the site map. A copy of the site map showing the boundaries of the engineering controls must be placed with the restrictive covenant when the restrictive covenant is recorded.

Each restrictive covenant required to be placed in a property chain of title shall be worded so that the restrictive covenant, and the easement provision thereof, is effective in perpetuity or until the DNR determines that the restrictive covenant is no longer necessary. Therefore, the restrictive covenant and easement affect the current owner and all subsequent owners of the property.

Only by the express, written consent of the DNR may the restrictive covenant be rescinded. Recision of the restrictive covenant is accomplished by DNR's placement of an additional document in the property chain of title indicating that the restrictive covenant has been rescinded. An example of this document is provided as Attachment E3. Recision may occur under the following circumstances:

- (1). if additional remediation is conducted at the property that lowers the contaminant levels to levels below Scenario A cleanup levels. However, any additional remediation must be conducted under the oversight of the DNR.
- (2). if the owner of the property can conclusively show, through a program of monitoring conducted under the oversight of the DNR, that contaminant levels have naturally decreased to levels less than Scenario A cleanup levels.



- (3). if new toxicology data becomes available that alters that the cleanup standards determined by the DNR to be appropriate for the site during the original evaluation. This determination shall be made by the Missouri Department of Health based on their review of the new toxicology data and existing site data. If necessary, DNR may require that such a request be accompanied by additional investigations at the site to provide the Department of Health with the site data necessary to adequately conduct its review.

4.6 Tier 3 Restrictive Covenant Provisions

While in some situations, restrictive covenant provisions for sites evaluated under Tier 3 may not vary considerably from provisions applicable to sites evaluated under the other tiers, other situations may call for specific restrictive covenant requirements considerably different from those that may be required for sites evaluated under one of the other tiers. Because modeling is used at Tier 3, and the point of compliance may be adjusted away from the source to no further than the site property line or the nearest sensitive receptor, whichever is closer, long term monitoring (at a frequency approved by DNR) may be a necessary component of a Tier 3 evaluation. If this is the case, the participant must submit a monitoring plan for the site that is acceptable to DNR, as discussed in Appendix C of this document. This monitoring plan will be referenced in the restrictive covenant for the site. However, to allow for the monitoring plan to be altered as needed (with DNR approval), the plan itself will not be made a part of the restrictive covenant.

Depending on specific site conditions, the monitoring plan provisions discussed above may apply either before or after DNR issues a certification of completion letter for a site. However, DNR only requires restrictive covenants for sites that it has determined will receive a certification of completion letter (when a restrictive covenant is required, issuance of the certification of completion letter is contingent on the restrictive covenant first being recorded). Therefore, it follows that monitoring must show that a site is not a threat to human health or the environment before the department will issue a certification of completion letter, whether a restrictive covenant qualifies the letter or not. Monitoring after issuance of a certification of completion letter is intended to determine whether conditions at a site have changed such that contaminants at the site have or may become a threat to human health and/or the environment.

As with restrictive covenants for sites evaluated under Tiers 1 and 2, a restrictive covenant for a Tier 3-evaluated site may be rescinded by the DNR if certain conditions are met or if circumstances dictate, as explained in 4.5.F.(1) through (3) above. Monitoring, when required for Tier 3-evaluated sites, may be used to determine if, and when, the restrictive covenant may be rescinded. As above, the restrictive covenant may only be



rescinded by DNR, through recording of an additional document in the property chain of title.

4.7 Where to Find Model Restrictive Covenant

A model Restrictive Covenant is attached (see Attachment E1). Form paragraphs for inclusion into the model Restrictive Covenant are provided in Attachment E2. A copy of a model Recision of Restrictive Covenant form is provided in Attachment E3, and a model Amendment/Modification of Restrictive Covenant form appears in Attachment E4.

5. MONITORING FEE

5.1. Explanation of Requirements and Amounts

Where a restrictive covenant is required, the DNR will collect a fee to pay costs associated with inspecting the property to which the restrictive covenant applies. Each inspection will seek to determine if the conditions of the institutional control mechanism are being met, to include, but not be limited to, those conditions pertaining to whether the use of the property has changed substantially and whether engineering controls installed as part of the overall remediation of the property are being adequately maintained.

The monitoring fee for properties with restrictive covenants but without engineering controls shall be a one-time payment not to exceed \$5,000, with the actual amount determined by the DNR on a site-specific basis.

The monitoring fee for properties with restrictive covenants and that have engineering controls in place shall be a one-time payment not to exceed \$10,000, with the actual amount determined by the DNR on a site-specific basis.

The monitoring fee for properties evaluated under Tier 3 of CALM that will require long term monitoring, whether of soil or groundwater contamination, shall be a one-time payment not to exceed \$15,000, with the actual amount determined by the DNR on a site-specific basis.

Criteria used by the DNR to determine the actual monitoring fee shall include, but not be limited to, the following: size of the site; complexity of the contamination; complexity of the site geology; proximity to sensitive receptors, whether human, other organisms, or habitats; extent and complexity of engineering controls; and relative toxicity of contaminants remaining in place.



The amount of the monitoring fee will be determined by DNR for each site and is not negotiable. The monitoring fee is a one time cost to the VCP participant; should the actual cost of monitoring activities increase, the DNR will not require for additional fees from the property owner(s).

The monitoring fee must be paid in full to DNR in the form of a cashier's check made payable to the Missouri Department of Natural Resources. DNR will not issue the certification of completion letter until the entire monitoring fee has been received.

6. MONITORING CONTRACT

6.1. General Discussion

All owners whose property will be subject to a restrictive covenant imposed under CALM must enter into a contract with DNR before the restrictive covenant is filed. The department will provide an unsigned copy of the contract to the VCP participant after any comments from the public participation process have been received, responded to, and incorporated as appropriate, after any disputes arising from the public participation process have been settled, and after DNR has approved the Remedial Action Plan for the site. However, the contract will not be signed by DNR or the VCP participant until after the remedial actions have been completed and DNR has approved the final CALM report. The contract will provide, as outlined in section 6.2 below, for the collection of the monitoring fee and will explain penalties the owner is subject to should the requirements of the restrictive covenant not be met or should the prohibitions of the restrictive covenant be violated. Penalties may be assessed, as specified in the contract, based on the seriousness of the violation. Penalties are intended to be used after notice of violation is made and a reasonable amount of time is allowed to return to compliance with the provisions of the restrictive covenant.

6.2. Specific Contract Provisions

A copy of the model contract used by DNR is attached to this appendix as Attachment E5. Specific provisions and requirements of the contract are indicated below.

- (1). The contract shall be signed by a representative of DNR and the all owner(s) of the subject property.
- (2). The contract shall set forth the amount of the monitoring fee and provide for its collection and use. The contract shall specify that the monitoring fee be used by DNR only for conducting inspections of the subject property to determine



compliance with the provisions of the restrictive covenant.

- (3). The contract shall set forth penalty amounts to be paid to DNR by the property owner should the provisions of the restrictive covenant be broken or not met. The penalty amounts shall be determined by DNR and shall be no less than \$100 per day per occurrence nor more than \$10,000 per day per occurrence. The contract shall provide for the collection of penalties by DNR and the legal remedies that DNR may seek in the event of nonpayment.
- (4). The contract shall explain that, in the event of noncompliance with the provisions of the restrictive covenant, DNR may seek injunctive relief against the owner in a court of law. Such injunctive relief may be in addition to seeking monetary penalties, as provided for in the contract.
- (5). The contract is a nonnegotiable legal document. Failure by the owner of a property with a restrictive covenant attached to enter into the contract will result in DNR's refusal to issue a certification of completion letter for the property.
- (6). The contract shall explain the specific conditions under which DNR may revoke the certification of completion letter and the mechanism by which this shall occur.
- (7). The contract shall stipulate that any disputes regarding provisions of the executed contract that cannot be resolved by the department's Hazardous Waste Program and the property owner may be brought before the Hazardous Waste Commission pursuant to 10 CSR 25-15.010(9).
- (8). The contract will be a legally binding document entered into willingly by DNR and the owner of the subject property.

7. DEFINITION OF SCENARIO A, B, AND C.

Refer to the flow chart in Figure 2 of the CALM document main text for guidance on determining the appropriate land use scenario. Note that the criteria used here to determine land use scenario are not intended to be all-inclusive. Uncommon or unusual site specific conditions may warrant classifying certain sites differently than through strict adherence to these criteria and definitions. These conditions will be evaluated by DNR.

Scenario A: The property is either being used for residential use, or zoning of the property is for residential use, or public access to the site is not restricted and children under 18 years of age are on the site more than 250 days per year. Scenario A should be considered



“unrestricted use.”

Scenario B: No residential use of the property, the property is publicly accessible but public access is limited to non-routine visits, and visitors are not supervised while on the property.

Scenario C: No residential use of the property and there is no public access to the site or public access is limited to non-routine visits during which the visitor is supervised the entire time they are on the property.

8. SUMMARY AND LIMITATIONS

8.1. Applicable to Institutional Controls

Institutional controls may be an integral part of the overall remediation of a site under the CALM process, particularly when Tiers 2 and 3 are used. The DNR has tried to tailor their structure and application to the CALM process. Please note, however, that extenuating circumstances may arise for which the institutional controls presented here are not effective. In such cases, the department will work with the VCP participant to devise appropriate, fair controls by which protection of public health and the environment can be assured while simultaneously providing the property owner some protection against future liability related to the environmental condition of the property.



APPENDIX E
ATTACHMENT E1
MODEL RESTRICTIVE COVENANT AND EASEMENT

DECLARATION OF RESTRICTIVE COVENANT AND EASEMENT

_____ has entered into a Letter of Agreement (Agreement) pursuant to the Voluntary Cleanup Program, § 260.565, *et seq.*, RSMo, with the Missouri Department of Natural Resources (DNR) for (name of facility), a site of environmental contamination located at (address of property) in the city (town, village, county, etc.) of _____, Missouri.

Paragraph _____ of the Agreement requires (name of property owner) to file a Restrictive Covenant and Easement with the _____ County Recorder of Deeds for the Property, as shown on the attached map and more particularly described as follows:

(insert legal description here)

Pursuant to the Agreement, _____ implemented certain response activities at the Property, including the following:

(insert response activities which have been conducted)

Because contaminants of concern will remain at levels above those appropriate for unrestricted use of the property, this Restrictive Covenant is being recorded with the County Recorder of Deeds for the purposes of protecting public health and safety, the environment, and to prevent interference with the performance, operation, and maintenance of any response activities selected and/or undertaken by the DNR, any party acting as an agent for the DNR, or any party acting pursuant to a work plan approved by the DNR.

For the purposes of this Restrictive Covenant and Grant of Easement, the term “Property Use A” refers to property whose use is unrestricted and that is either being used for residential use, or is zoned for residential use, or access to the Property is not restricted and children under 18 years of age are on the Property more than 250 days per year. Property Use B refers to property not included in “Property Use A”, which is publicly accessible with public access limited to non-routine visits, and where visitors are not supervised while on the property.

If any provision of this Restrictive Covenant and Grant of Easement is the subject of any laws or regulations established by any federal, state, or local government, the stricter of the two standards shall prevail.

NOW THEREFORE, **(insert name of property owner)**, **(insert mailing address of owner)** (hereinafter referred to as the “Owner”), hereby imposes restrictions on the Property and covenants and agrees that:

1. Purpose.

In accordance with the Agreement, the purpose of this Restrictive Covenant is to assure:



(INSERT APPROPRIATE FORM PARAGRAPH(S) FROM ATTACHMENT E2, SECTION 1 HERE)

2. Restrictions Applicable to the Property.

In furtherance of the purposes of this Restrictive Covenant, Owner shall assure that use, occupancy, and activity of and at the Property are restricted as follows:

(INSERT APPROPRIATE FORM PARAGRAPH(S) FROM ATTACHMENT E2, SECTION 2 HERE)

The Owner shall prohibit all activities as presented above that will result in human exposures above those specified in the cleanup assessment or risk assessment performed or approved by the Missouri Department of Health for the Property or that would result in the release of a hazardous substance that was contained as a part of the remedial action.

3. Potential Hazards.

Except as provided in Paragraph 4 below, no action shall be taken, allowed, suffered, or omitted if such action or omission is reasonably likely to:

- I. Create a risk of migration of contaminants or a potential health hazard to human health or the environment.
- ii. (INSERT PARAGRAPH FROM ATTACHMENT E2, SECTION 3 IF ENGINEERING CONTROLS ARE IN PLACE)

4. Emergencies.

In the event of an emergency which presents a significant risk to human health or the environment, the application of Paragraph 3 above may be suspended, provided such risk cannot be abated without suspending such Paragraph and the Owner:

- I. Immediately notifies the DNR of the emergency;
- ii. Limits both the extent and duration of the suspension to the minimum reasonably necessary to adequately respond to the emergency;
- iii. Implements all measures necessary to limit actual and potential present and future risk to human health and the environment resulting from such suspension; and
- iv. Implements a plan approved in writing by the DNR-Hazardous Waste Program (HWP), on a schedule approved by the DNR-HWP, to ensure that the Property is remediated or restored to its condition prior to such emergency.

5. Alterations of Property.

Owner shall not make, or allow or suffer to be made, any alteration of any kind in, to, or about any portion of the Property inconsistent with this Restrictive Covenant unless the Owner has first recorded the DNR-HWP's written approval of such alteration upon the land records of _____ County Recorder of Deeds. The Owner may appeal DNR-HWP decisions regarding proposed alterations to the Missouri Hazardous Waste



Management Commission pursuant to 10 CSR 20-15.010(9).

6. Grant of Easement to the DNR.

Owner hereby grants and conveys to the DNR, its agents, contractors, and employees, and to any person performing pollution remediation activities under the direction thereof, a non-exclusive easement (the "Easement") over the Property and over such other parts of the Property as are necessary for access to the Property or for carrying out any actions to abate a threat to human health or the environment related to the VCP-approved remedial action plan. Pursuant to this Easement, the DNR, its agents, contractors, and employees, and any person performing pollution remediation activities under the direction thereof, may enter upon and inspect the Property and perform such investigations and actions as the DNR deems necessary for any one or more of the following purposes:

- i. Ensuring that use, occupancy, and activities of and at the Property are consistent with this Restrictive Covenant;
- ii. Ensuring that any remediation implemented complies with state law, including, but not limited to, § 260.350, *et seq.*, RSMo; § 260.565, *et seq.*, RSMo; § 260.435, *et seq.*, RSMo; § 260.500, *et seq.*, RSMo;
- iii. Performing any additional investigations or remediation necessary to protect human health and the environment as related to the VCP- approved remedial action plan;
- iv. (INSERT PARAGRAPH FROM ATTACHMENT E2, SECTION 4 HERE IF ENGINEERING CONTROLS ARE USED)

7. Notice and Time of Entry onto Property.

Entry onto the Property by the DNR pursuant to this Easement shall be upon reasonable notice (not less than 2 weeks) and at reasonable times, provided that entry shall not be subject to these limitations if the DNR determines that immediate entry is necessary to protect human health or the environment.

8. Notice to Lessees and Other Holders of Interest in the Property.

Owner, or any future holder of any interest in the Property, shall cause any lease, grant, or other transfer of any interest in the Property to include a provision expressly requiring the lessee or transferee to comply with this Restrictive Covenant and Grant of Easement. The failure to include such provision shall not affect the validity or applicability to the Property of this Restrictive Covenant and Grant of Easement.

9. Persons Entitled to Enforce Restrictions.

The restrictions in this Restrictive Covenant on use, occupancy, and activity of and at the Property shall be enforceable in an appropriate Court by Owner and/or by the DNR, their successors, transferees, and assigns.

**10. Interfering Activities.**

The Owner shall prohibit all activities on the Property which may interfere with the response activities, operation and maintenance, long-term monitoring, or measures necessary to assure the effectiveness of the remedial action.

11. Written Notice Required.

The Owner shall provide written notice to the Director, DNR, of the intent to transfer an interest in the Property not less than 14 days prior to the expected date of transfer.

12. Property Conveyance.

The Owner shall not convey any title, easement, or other interest in the Property without adequate and complete provision for the continued implementation, operation, and maintenance of any remedial action that has been implemented on the Property and without assuring prevention of the releases and exposures described in the provisions of number 8, above.

13. Duration.

The restrictions and other requirements described in this Restrictive Covenant and Grant of Easement shall run with the land and shall be binding upon any future Owners, heirs, successors, lessees, or assigns and their authorized agents, employees, or persons acting under their direction or control. This Restrictive Covenant and Grant of Easement shall continue into perpetuity, unless and until rescinded by DNR. A copy of this Restrictive Covenant and Grant of Easement shall be provided to all heirs, successors, assigns, and transferees of Owner.

If any provision of this Restrictive Covenant and Grant of Easement is held invalid by any Court of competent jurisdiction, invalidity of any such provision shall not affect the validity of any other provisions hereof. Also, such provisions shall continue unimpaired in full force and effect.

14. Amending, Modifying, or Rescinding the Restrictive Covenant

This Restrictive Covenant and Grant of Easement shall not be amended, modified or terminated except by a written instrument executed by and between the Owner at the time of the proposed amendment, modification, or termination and the DNR-HWP. Within five (5) days of executing an amendment, modification, or termination of this Restrictive Covenant and Grant of Easement, the Owner shall record such amendment, modification, or termination, on the appropriate form provided by the DNR, with the _____ County Recorder of Deeds, and within five (5) days thereafter, the Owner shall provide a true copy of the recorded amendment, modification, or termination to the DNR-HWP.



In the event the department determines that risks posed by the site have substantially changed subsequent to the execution of this Restrictive Covenant and Grant of Easement (e.g., contaminant levels at the site change, or cleanup levels change), the department may rescind this Restrictive Covenant and Grant of Easement.

[SEE RECISION OF RESTRICTIVE COVENANT AND GRANT OF EASEMENT (ATTACHMENT E3), AMENDMENT/MODIFICATION OF RESTRICTIVE COVENANT AND GRANT OF EASEMENT (ATTACHMENT E4) FORMS]

15. Disputes

Any disputes regarding provisions of this contract that cannot be resolved by the Hazardous Waste Program and the property owner will be addressed pursuant to 10 CSR 25-15.010(9).

SIGNATURES

The undersigned property owner or person executing this Restrictive Covenant and Grant of Easement on behalf of the Owner represents and certifies that they are truly authorized and have been fully empowered to execute and deliver this Restrictive Covenant and Grant of Easement.

Property owner(s) or authorized representative(s) thereof

Date:

Date:

Date:

IN WITNESS WHEREOF, the Owner(s) or Owner's authorized representative(s) of the above-described Property has caused this Restrictive Covenant and Grant of Easement to be executed on this _____ day of _____, _____. Signed in the presence of Property Owner subscribed and sworn to.



Subscribed and sworn to before me this ____ day of _____, _____.

Notary Public

My commission expires _____.



APPENDIX E
ATTACHMENT E2
MODEL PARAGRAPHS FOR USE IN RESTRICTIVE COVENANTS

1. Purpose(s) of Restrictive Covenant

Insert one or more of the following as applicable at section 1 of the restrictive covenant

- A. That the Property is not used in a manner such that the definition of Property Use A would apply to the Property.
- B. That groundwater at the Property is not utilized for drinking or bathing.
- C. That humans are not exposed to soils at the Property polluted with substances in concentrations exceeding the levels established in the cleanup plan or risk assessment for the Property, which assessment has either been prepared or approved by the Missouri Department of Health.
- D. That storm water or water of other origin does not infiltrate soils at the Property polluted with substances in concentrations exceeding the pollutant mobility criteria established by DNR.
- E. That Buildings are not constructed over soils or ground water at the Property polluted with substances in concentrations exceeding the volatilization criteria established by DNR.
- F. That the engineered control(s) described in Exhibit ____ attached hereto and by the reference incorporated herein is not disturbed and is properly maintained to prevent human exposure to soils at the Property polluted with substances in concentrations exceeding the levels established in the cleanup plan or risk assessment for the Property, in accordance with the provisions set forth in the (insert date) report prepared by and approved by the DNR.
- G. Other (as circumstances dictate; a description of other purposes shall be provided to the owner as needed).

2. Restrictions

Restrictions fall into several categories including land use restrictions, groundwater, disturbance, and construction. Depending on site-specific conditions, restrictions other than those listed here may be appropriate, and will be negotiated between the property owner and DNR.

USE RESTRICTIONS:



- A. The Property currently meets DNR standards for restricted commercial use and, based on reports on file at the DNR offices in Jefferson City, Missouri, the contaminants present pose no significant present or future risk to human health or the environment based on restricted commercial use of the Property. No further response action for the Property is required by the DNR as long as the Property is not to be used for residential or other purposes constituting unrestricted use. The Property shall not be used for purposes other than commercial or industrial uses. If any person desires in the future to use the Property for residential or other purposes constituting unrestricted use, the DNR must be notified 120 days in advance and further analyses and, as necessary, response actions will be necessary prior to such use. The Property may not be used in a manner such that the definition of Property Use A would define the use of the site.
- B. The Property currently meets DNR standards for restricted industrial use and, based on reports on file at the DNR offices in Jefferson City, Missouri, the contaminants present pose no significant present or future risk to human health or the environment based on restricted industrial use of the Property. No further response action for the Property is required by the DNR as long as the Property is not to be used for residential or other purposes constituting unrestricted use or for commercial purposes. The Property shall not be used for purposes other than industrial uses. If any person desires in the future to use the Property for residential or other purposes constituting unrestricted use or for commercial purposes, the DNR must be notified 120 days in advance and further analyses and, as necessary, response actions will be necessary prior to such use. The Property may not be used in a manner such that the definition of Property Use A or Property Use B would define the use of the site.
- C. The Property currently meets DNR standards for restricted commercial use and, based on reports on file at the DNR offices in Jefferson City, Missouri, the contaminants present pose no significant present or future risk to human health or the environment based on restricted commercial use of the Property. No further response action for the Property is required by the DNR as long as the Property is not to be used for residential or other purposes constituting unrestricted use. The Property is protective for restricted commercial use as long as the **(insert engineering or other physical controls in place)** is/are maintained to prevent exposure. The Property shall not be used for purposes other than commercial uses. If any person desires in the future to use the Property for residential or other purposes constituting unrestricted use, the DNR must be notified 120 days in advance and further analyses and, as necessary, response actions will be necessary prior to such use. The Property may not be used in a manner such that the definition of Property Use A would define the use of the site.



- D. The Property currently meets DNR standards for restricted industrial use and, based on reports on file at the DNR offices in Jefferson City, Missouri, the contaminants present pose no significant present or future risk to human health or the environment based on restricted industrial use of the Property. No further response action for the Property is required by the DNR as long as the Property is not to be used for residential or other purposes constituting unrestricted use or for commercial purposes. The Property is protective for restricted industrial use as long as the **(insert engineering or other physical controls in place)** is/are maintained to prevent exposure. The Property shall not be used for purposes other than industrial uses. If any person desires in the future to use the Property for residential or other purposes constituting unrestricted use or for commercial purposes, the DNR must be notified 120 days in advance and further analyses and, as necessary, response actions will be necessary prior to such use. The Property may not be used in a manner such that the definition of Property Use A or Property Use B would define the use of the site.

GROUNDWATER RESTRICTIONS:

- E. The groundwater beneath the Property contains contaminants identified in reports on file at the DNR offices in Jefferson City, Missouri at concentrations that exceed the cleanup standards of the DNR. Therefore, the owner and operator of the Property must prevent: use of and exposure to the groundwater; any artificial penetration of the groundwater-bearing unit(s) containing contaminants which could result in cross-contamination of clean groundwater-bearing units; installation of any new groundwater wells on the Property, except those used for investigative purposes; use of groundwater for drinking or other domestic purposes and the use of groundwater for purposes other than domestic purposes; release of groundwater to surface water bodies, whether such release is the result of anthropic activities or is naturally occurring. Should a release of contaminated groundwater occur, the owner must take action to contain and properly dispose of such groundwater. Groundwater beneath the Property shall be monitored by the owner in accordance with specific requirements of the DNR-approved monitoring plan unless or until the DNR approves any modifications.
- F. The groundwater beneath the Property contains contaminants identified in reports on file at the DNR offices in Jefferson City, Missouri at concentrations that exceed the cleanup standards of the DNR, and **(insert physical or engineering controls)** have been constructed in the area located on the map attached as **“Exhibit ().”** The physical or engineering controls must remain in place and effective in accordance with the DNR-approved **(insert name of plan)** unless or until the DNR



approves any modifications. Additionally, the owner and operator of the Property must prevent: use of and exposure to the groundwater; any artificial penetration of the groundwater-bearing unit(s) containing contaminants which could result in cross-contamination of clean groundwater-bearing units; the installation of any new groundwater wells on the Property, except those used for investigative purposes; the use of groundwater for drinking or other domestic purposes and the use of groundwater for purposes other than domestic purposes; and release of groundwater to surface water bodies, whether such release is the result of anthropic activities or is naturally occurring. Should a release of contaminated groundwater occur, the owner must take action to contain and properly dispose of such groundwater. Groundwater beneath the Property shall be monitored by the owner in accordance with specific requirements of the DNR-approved monitoring plan unless or until the DNR approves any modifications.

DISTURBANCE RESTRICTIONS:

- G.** Soil at the Property contains contaminants, as identified in reports on file at the DNR offices in Jefferson City, Missouri, at concentrations exceeding the DNR's cleanup standards for **(commercial (Property Use B)/industrial (Property Use C))** use **[in the areas shown on the map at Exhibit () attached hereto]**. Therefore, soil at the Property **[in the areas shown on the map at Exhibit () attached hereto]** shall not be excavated or otherwise disturbed in any manner without the written permission of the DNR. Should the owner or operator desire to disturb soil at the Property **[in one or more of the areas shown on the map at Exhibit () attached hereto]**, they shall request permission to do so from the DNR at least 30 days before the soil disturbance activities are to begin. Based on the potential hazards associated with the soil disturbance activities, the DNR may deny the request to disturb the soils or may require specific protective or remedial actions before allowing such soil disturbance activities to occur.

CONSTRUCTION RESTRICTIONS:

- H.** Soil at the Property contains contaminants, as identified in reports on file at the DNR offices in Jefferson City, Missouri, at concentrations exceeding the DNR's cleanup standards for **(commercial (Property Use B)/industrial (Property Use C))** use **[in the areas shown on the map at Exhibit () attached hereto]**. Therefore, no buildings may be constructed on the Property **[in the areas shown on the map at Exhibit () attached hereto]** except with the written permission of the DNR. Should the owner or operator desire to construct a building on the Property **[in one or more of the areas shown on the map at Exhibit () attached**



hereto], they shall request permission to do so from the DNR at least 30 days before construction is anticipated to begin. Based on the potential hazards associated with the construction activities, the DNR may deny the request to construct or may require specific protective or remedial actions before allowing such construction activities to occur.

3. Prohibited actions likely to affect the integrity of engineering controls

Insert the following at number 3. of the restrictive covenant only if engineering controls are in place at the Property:

- ii. Result in disturbance of the structural integrity of any engineering controls designed or utilized at the Property to contain contaminants or limit human and/or ecological exposure to contaminants.

4. Ensuring integrity of engineering controls

Insert the following language at number 6 of the restrictive covenant if engineering controls are a part of response actions taken at the Property:

- iv. Ensuring the structural integrity of any engineering controls described in this Restrictive Covenant and Grant of Easement and their continuing effectiveness in containing contaminants and limiting human and ecological exposure to the contaminants.”



APPENDIX E
ATTACHMENT E3
RECISION OF RESTRICTIVE COVENANT AND GRANT OF EASEMENT

On the ____ day of _____, _____, based on the requirements of the Missouri Department of Natural Resources (MDNR), a Restrictive Covenant and Grant of Easement was filed under Clerk's Book _____, Page _____ in the Real Property Records of _____ County, Missouri with respect to the Property described as follows:

(insert legal description of property as it appears on Restrictive Covenant)

Records regarding the above-described Property are on file at the offices of the MDNR in Jefferson City, Missouri.

Based on **(describe additional remediation or other changes in circumstances)**, the circumstances that required the filing of the Restrictive Covenant and Grant of Easement no longer exist. Therefore, by this Notification of Recision the MDNR hereby releases the Property from the requirement(s) set forth in the Restrictive Covenant and Grant of Easement.

This Notification of Recision renders the Restrictive Covenant and Grant of Easement of no further force or effect, as fully as if the Restrictive Covenant and Grant of Easement had never been executed or filed of record.

Executed this ____ day of _____, _____.

Missouri Department of Natural Resources

By: _____

Name: _____

Title: _____

BEFORE ME, on this ____ day of _____, _____ personally appeared ____ **(name)**, ____ **(title)**, of the Missouri Department of Natural Resources, known to me to be the person and agent of said department whose name is subscribed to the foregoing instrument, and they acknowledged to me that they executed the same for the purposes and in the capacity herein expressed.



Subscribed and sworn to before me this ____ day of _____, _____.

Notary Public

My commission expires _____, _____.



APPENDIX E
ATTACHMENT E4
AMENDMENT/MODIFICATION OF RESTRICTIVE COVENANT AND GRANT OF
EASEMENT

On the ____ day of _____, _____, based on the requirements of the Missouri Department of Natural Resources (MDNR), a Restrictive Covenant and Grant of Easement was filed under Clerk's Book _____, Page _____ in the Real Property Records of _____ County, Missouri with respect to the Property described as follows:

(insert legal description of property as it appears on Restrictive Covenant)

Records regarding the above-described Property are on file at the offices of the MDNR in Jefferson City, Missouri.

Based on **(describe additional remediation or other changes in circumstances that necessitate the amendment/modification)**, the circumstances that required the filing of the Restrictive Covenant and Grant of Easement have changed. Therefore, by this Notice of Amendment/Modification, the MDNR and the undersigned representative of the owner of the Property agree to amend the Restrictive Covenant and Grant of Easement as follows:

(insert specific amended language including section number)

The language presented above supersedes the language found in the section number described above of the original Restrictive Covenant and Grant of Easement filed on the ____ of _____.

Executed this ____ day of _____, _____.

Missouri Department of Natural Resources

By: _____

Name: _____

Title: _____

BEFORE ME, on this ____ day of _____, _____ personally appeared ____ **(name)**, ____ **(title)**, of the Missouri Department of Natural Resources, known to me to be the person and agent of said department whose name is subscribed to the foregoing instrument, and



they acknowledged to me that they executed the same for the purposes and in the capacity herein expressed.

Subscribed and sworn to before me this ____ day of _____, ____.

Notary Public

My commission expires _____, ____.

Executed this ____ day of _____, ____.

Property Owner/Representative

By: _____

Name: _____

Title: _____

BEFORE ME, on this ____ day of _____, _____ personally appeared ____ **(name)**
, ____ **(title)** _____, known to me to be the person and representative of the owner of the above-described Property whose name is subscribed to the foregoing instrument, and they acknowledged to me that they executed the same for the purposes and in the capacity herein expressed.

Subscribed and sworn to before me this ____ day of _____, ____.

Notary Public

My commission expires _____, ____.



APPENDIX E
ATTACHMENT E5
VCP INSTITUTIONAL CONTROL CONTRACT

_____ has entered into a Letter of Agreement pursuant to the Voluntary Cleanup Program, §260.565, *et seq.*, RSMo. with the Missouri Department of Natural Resources (DNR) for (name of facility or site), a site of environmental contamination located at (address of facility or site) in the city (town, village) of _____, _____ County, Missouri.

The site or facility (hereafter “site”) has been remediated to a level safe for its current or intended use as specified in the DNR - HWP approved remedial action plan provided that certain risk reduction and exposure control measures remain in place. The DNR has an obligation to protect human health and the environment and to assure that all of the risk reduction and exposure control measures in the remedial action plan (and any amendments thereto) remain intact, functional, and able to serve their intended purposes.

NOW THEREFORE, [insert name of Property owner], [insert mailing address of owner] (here after referred to as the “Owner”) hereby agrees that:

1. The Owner shall pay to DNR a one time fee of \$_____ to be used to fund regular inspections of the risk reduction and exposure control measures implemented at the site.



2. Owner agrees to execute and file with the _____ County Recorder of Deeds the Restrictive Covenant and Easement, a copy of which is attached hereto and incorporated herein by this reference as Exhibit A.

3. If DNR determines that the Owner has failed to comply with the terms of this Agreement or the Restrictive Covenant and Easement, or fails to comply with the terms of the Letter of Agreement or fails to comply with the DNR approved remedial action plan, the Certification of Completion Letter as provided by the DNR pertaining to this site shall be rescinded and deemed null and void. A copy of the Certification of Completion letter for this site is attached as Exhibit B. A notice shall be filed by the DNR with the _____ County Recorder of Deeds in the chain of title for this site that confirms the rescission of said Certification of Completion Letter.

4. If DNR determines that the Owner has failed to comply with the terms of this Agreement or the Restrictive Covenant and Easement, the Letter of Agreement or the DNR approved remedial action plan, DNR may require the Owner to pay a penalty of not less than \$100 per day per occurrence and not more than \$10,000 per day per occurrence for each violation of any of the terms of the aforementioned documents.

5. The Owner shall file this Agreement and the Restrictive Covenant and Easement with the



_____ County Recorder of Deeds within five (5) days of execution of this agreement and provide to DNR - HWP evidence of such recording, to include a copy of the documents filed and stamped filed by the _____ County Recorder of Deeds.

The undersigned person executing this Agreement on behalf of the Owner represent and certifies that they are truly authorized and have been fully empowered to execute and deliver this Agreement.

IN WITNESS WHEREOF, the Owner of the site has caused this agreement to be executed on this _____ day of _____, 19____.

Signed in the presence of Property Owner subscribed and sworn to.

Signature of Owner

Subscribed and sworn to before me this ____ day of _____, 19____.

Notary Public

My commission expires _____.



IN WITNESS WHEREOF, the Missouri Department of Natural Resources has caused this agreement to be executed on this _____ day of _____, 19____.

Signed in the presence of the Missouri Department of Natural Resources subscribed and sworn to.

Missouri Department of Natural Resources

Subscribed and sworn to before me this _____ day of _____, 19____.

Notary Public

My commission expires _____.